UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: October 20, 1999 Decided: February 28, 2000)

Docket No. 98-2686

DARIUS MORGAN,

Petitioner-Appellant,

– v.–

FLOYD BENNETT, Superintendent,
Elmira Correctional Facility,

Respondent-Appellee.

Before:

KEARSE, MINER, and LEVAL,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge*, denying petition for habeas corpus alleging deprivation of rights to confer with counsel and to confront witnesses.

Affirmed in part, vacated in part, and remanded.

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*361 HARRY JHO, New Haven, Connecticut (Brett Dignam, The Jerome N. Frank Legal Services Organization, New Haven, Connecticut, on the brief), for *Petitioner-Appellant.*

CAMILLE O'HARA GILLESPIE, Assistant District Attorney, Brooklyn, New York (Charles J. Hynes, District Attorney for *362 Kings County, Roseann B. MacKechnie, Assistant District Attorney, Brooklyn, New York, on the brief), for *Respondent-Appellee.*

KEARSE, *Circuit Judge:*

Petitioner Darius Morgan, a New York State ("State") prisoner convicted of murder and attempted murder, appeals from a judgment of the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge,* denying his petition pursuant to 28 U.S.C. § 2254 (1994 & Supp. II 1996) for a writ of habeas corpus alleging principally that his Sixth Amendment right to counsel was infringed when the trial court ordered his attorney not to disclose to him that a certain witness was to testify on the following day. Morgan also alleged, *inter alia,* that his Sixth Amendment right to confront the witness was abridged by other rulings of the trial court. The district court held that the trial court's instruction to Morgan's attorney was not impermissible and ruled that Morgan's confrontation claim was procedurally barred. Morgan challenges these rulings on appeal. For the reasons that follow, we reject his assistance-of-counsel claim, and we affirm the denial of his petition to the extent that it dismissed that claim. However, we conclude that his confrontation claim is not procedurally barred, and we vacate and remand for further proceedings with respect to that claim.

I. BACKGROUND

During the early morning hours of February 27, 1987, in an apartment in Brooklyn, New York, Denise Hill was shot and wounded; her friend Rachel Layne was shot and died shortly thereafter. Hill had known Morgan prior to these events, having bought drugs from him and having begun a sexual relationship with him. While hospitalized after the shooting, Hill selected Morgan's picture from a photographic array, identifying him as the shooter. Morgan was arrested and charged with murder and attempted murder. Hill was scheduled to testify at his trial.

Prior to trial, Morgan moved to suppress Hill's identification testimony. At a suppression hearing held on May 15, 1989, Hill described her relationship with Morgan and gave a more detailed account of the above events. The court denied the motion to suppress.

A. *The Events Preceding Hill's Testimony at Trial*

On May 30, 1989, after Morgan's trial had begun but before Hill testified, a court officer informed the court that Morgan had spoken to Hill outside of the courtroom, stating "You look good," and asking her, "Are you with me or what?" (Trial Transcript ("Tr.") 162-63.) Although Morgan's attorney stated that Morgan had merely nodded at Hill, the court admonished Morgan and warned him against further attempts at communication.

Later that day, Hill was called to testify. Shortly before she was to be brought into the courtroom, however, she stated that she would not take the witness stand, and she threatened to "take the fifth" unless she could speak with prosecutors. (Tr. 231-32.) Thereafter, in a conference conducted outside the presence of Morgan and the jury, the prosecutor informed the court that Hill was "terrified of testifying against" Morgan

and "feared for her family's safety and especially the safety of her daughter." (Tr. 233.) The prosecutor stated that, according to Hill (who was herself then incarcerated on an unrelated charge), two associates of Morgan, "Charles Brown," better known as "Chucky," and "Marty," had visited her in jail and said they knew that she was to be the principal witness at Morgan's trial. They stated that Morgan was "facing too much time" and "proceeded to ask her about her eight-year old daughter" in a *363 way that Hill found disturbing. (Tr. 234.) On other occasions, Marty had approached Hill's mother and sister in a threatening manner. (Tr. 235.)

The prosecutor requested that the proceedings be adjourned for the day so that she could prepare a motion for a "*Sirois* hearing," *i.e.*, a hearing to determine whether a witness's unavailability or unwillingness to testify was caused by misconduct on the part of the defendant, such that "the defendant will be deemed to have waived any objection to the admissibility of the witness' prior Grand Jury testimony and said testimony may be admitted as direct evidence at the defendant's trial." *Holtzman v. Hellenbrand*, 92 A.D.2d 405, 415, 460 N.Y.S.2d 591, 597 (2d Dep't 1983) (per curiam). Over Morgan's objection, the court granted the adjournment.

On the following morning, in a conference from which Morgan was excluded, the court notified counsel that it had been informed by a court officer that after the previous day's adjournment, Morgan had blown a kiss to Hill as he was being returned to his holding cell, and said, "I love you too. You don't have to worry about nothing. You took good care of it." (Tr. 249-50.) After the court officer was questioned, the prosecutor elaborated on the fears that had been expressed by Hill. According to Hill, Chucky and Marty had visited her in jail after she testified at the suppression hearing. They told her that if she testified at trial, they could not guarantee that nothing would happen to her family. They stated that they could, however, guarantee that

nothing would happen to her family if she did not testify.

Following a luncheon recess, the conference resumed and the prosecutor reported that Hill remained concerned for her safety but was wavering about whether or not to testify. The court decided to grant the motion for a *Sirois* hearing, and it instructed the prosecutor to have her other witnesses brought to court. After calling her office, the prosecutor informed the court that Hill had now indicated that although she "was still afraid . . . she would take the stand and testify." (Tr. 280.) Because the court had not yet obtained counsel to represent Hill in connection with the possible invocation of her Fifth Amendment privilege against self-incrimination, however, Hill could not be called to testify until the next day. The court decided to begin the *Sirois* hearing in case Hill changed her mind a third time and refused to testify. The court noted that if Hill testified the following morning, the hearing would be abandoned as unnecessary.

Before adjourning the conference and opening the *Sirois* hearing, the court instructed Morgan's counsel "not to discuss with your client . . . that Miss Hill may take the stand tomorrow once the jury is brought up and may testify in connection with the trial proper." (Tr. 284.) The court stated that the revived expectation that Hill would testify was "[t]he only thing I am directing you not to discuss with your client." (*Id.*) Although counsel objected and argued that the restriction was improper, he stated that he would comply.

The *Sirois* hearing was begun that afternoon, with Morgan present. One witness, a police detective, described in detail Hill's fears and the threats Hill had reported receiving from Morgan and his associates. As it turned out, however, the *Sirois* hearing was not completed because on the following morning, June 1, Hill testified.

B. *Hill's Testimony and the Proposed Impeachment Evidence*

To the extent pertinent here, Hill testified at trial that she had gone to the apartment on February 23, 1987, to buy drugs and had remained there through the early morning hours of February 27, when the shootings occurred. With her at the apartment were Morgan, Layne, and a man known to Hill as "Monk." In the wee hours of February 27, Hill, Layne, Monk, *364 and Monk's brother Randy were in the living room of the apartment smoking crack cocaine.

Between 6:00 and 6:30 a.m., Morgan briefly left the apartment, returning in a state of agitation because he could not find his car and asking what had happened to it. When no one could provide an answer, Morgan said, "Y'all don't tell me what happened to my car, I'm going to murder everybody in here." (Tr. 364.) He asked Monk and Randy, "If I murder, if I knock them off, would y'all tell on me?" (*Id.*) After Monk and Randy said they would not, Morgan pulled out a gun and shot Hill in the knee and back. He shot and wounded Layne, who vainly sought refuge in another room; she was pursued by Morgan who shot her repeatedly, inflicting wounds that proved to be fatal. Morgan then fled the apartment.

Hill testified that Monk then told her not to mention Morgan's involvement to anyone and to say that the shooting was drug-related. Hill obeyed this instruction when she was first interviewed after the shootings, stating that the crimes had been committed by unidentified persons who had entered the apartment. Only thereafter did she describe the events above and disclose that Morgan was the shooter.

In cross-examining Hill, defense counsel attempted to ask whether anyone had threatened Hill or forced her to testify. The court disallowed that line of questioning, expressing concern that it would raise "a hornet's nest

in connection with threats." (Tr. 476-77, 480.)

Defense counsel also informed the court that he wished to call a witness who would testify that the district attorney had forced Hill to testify. Thereafter, in a "preliminary offer of proof," counsel stated that Gladstone Smith, an inmate at Rikers Island, would testify that Hill had told her that Layne's stepmother was "forcing her to testify; that she didn't want to testify; and as a result of their forcing her, she was going on the stand, but she was not comfortable going on the stand because she was saying things that weren't true." (Tr. 523-24.) The court stated that it believed the issue would be "collateral" (Tr. 526); however, without ruling that Smith would be allowed to testify, it signed a subpoena so that defense counsel could bring Smith into court. On the following day, notwithstanding the subpoena, Smith was not produced in court, and defense counsel requested a continuance. The court concluded that the issue to which Morgan sought to have Smith testify—that Hill had been pressured to deliver fabricated testimony—was collateral and unsupported, and it therefore refused to grant a continuance. The defense rested without calling any witnesses.

The jury found Morgan guilty of murder in the second degree and attempted murder in the second degree. He was sentenced to 25-years-to-life imprisonment for the murder and 10-20 years for the attempted murder, to run consecutively to each other and to a prison term that he was then serving on an unrelated conviction. The Appellate Division affirmed Morgan's conviction, and leave to appeal to the New York Court of Appeals was denied. *See People v. Morgan*, 176 A.D.2d 359, 574 N.Y.S.2d 592 (2d Dep't 1991), *lv. denied*, 79 N.Y.2d 861, 580 N.Y.S.2d 733 (1992).

C. *The Present Proceeding*

Morgan filed his present petition for a writ of habeas corpus in 1996, asserting a variety of claims. Those

pertinent to this appeal are his contention that he was unconstitutionally deprived of unrestricted access to his attorney for a lengthy period, in violation of the principle established in *Geders v. United States*, 425 U.S. 80, 91 (1976), and his contention that his right to confront Hill was abridged by the restriction of his cross-examination of her and the exclusion of the impeaching testimony anticipated from Smith.

*365 In a Memorandum and Order dated May 27, 1998, the district court denied the petition. *See* 1998 WL 315135 (E.D.N.Y.). The court rejected Morgan's assistance-of-counsel claim on its merits. *See id.* at *5-7. Although the court stated that a complete ban on counsel-defendant communications for a lengthy period would have been unconstitutional, it noted that

> the prohibition in this case did not prevent defendant from conferring with his counsel "altogether." *Perry v. Leeke*, 488 U.S. 272, 280 (1989)], (citing *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Indeed, it did not preclude petitioner from seeking any advice or guidance from his lawyer, and his lawyer was free to discuss anything relating to the trial except the fact that Denise Hill was again likely to testify. This restriction was justified by the prior threats against Denise Hill.

1998 WL 315135, at *6. As discussed in greater detail in Part II.B. below, the district court ruled that Morgan's confrontation claim of impermissible preclusion of evidence as to the alleged pressures on Hill to testify was procedurally barred. *See id.* at *7-12.

The court denied the habeas petition in its entirety but granted a certificate of appealability with respect to the issues of (1) whether Morgan was unconstitutionally deprived of his right to confer with counsel, and (2) whether Morgan properly preserved his challenges to the trial court's exclusion of the proposed cross-examination of Hill and the impeachment testimony he proposed

to elicit from Smith. *See id.* at *12.

II. DISCUSSION

On appeal, Morgan pursues the assistance-of-counsel and confrontation claims as to which a certificate of appealability was granted. For the reasons that follow, we conclude that the assistance-of-counsel claim lacks merit and that the confrontation claim should not have been dismissed for lack of exhaustion.

A. *The Prohibition Against Counsel's Informing Morgan that Hill Was Again Scheduled To Testify*

A defendant in a criminal trial is guaranteed not just the right to be represented by counsel but the right to the effective assistance of counsel. *See, e.g., United States v. Cronic*, 466 U.S. 648, 654 (1984); *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Accordingly, the court may not properly restrict the attorney's ability to advise the defendant unless the defendant's right to receive such advice is outweighed by some other important interest.

In *Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989), the Supreme Court considered Sixth Amendment claims of interference with the right to effective assistance of counsel in the context of instructions that a defendant and his attorney not confer during a recess that interrupted the defendant's trial testimony. In *Geders*, the interruption occurred when the trial was adjourned for the day, and the prohibition thus covered an approximately 17-hour period through the resumption of trial on the following day; in *Perry*, the recess took place during the trial day and was of 15 minutes' duration.

In both cases, the Supreme Court noted that most witnesses may be ordered not to confer with counsel

during an interval in which their trial testimony is interrupted. As the *Geders* Court observed, the purposes of such an order are principally to

> exercise[ ] a restraint on witnesses "tailoring" their testimony to that of earlier witnesses; . . . [to] aid [ ] in detecting testimony that is less than candid . . . . [and to] prevent[ ] improper attempts to influence the testimony in light of the testimony already given.

*366 425 U.S. at 87. As the *Perry* Court elaborated,

> it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.

488 U.S. at 282.

In light of an accused's Sixth Amendment right to counsel, however, that method of forestalling the coaching or tailoring of testimony is limited when the witness is the defendant in a criminal proceeding. In *Geders*, the Court concluded that an order "prevent[ing the defendant] from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel," was too great a restriction in light of the interest that the trial court sought to protect. 425 U.S. at 91. The Court noted that "[t]here are other ways to deal with the problem of possible improper influence on testimony or 'coaching' of a witness short of putting a barrier between client and counsel for so long a period as 17 hours." *Id.* at 89. The trial court could in many instances, for example, eliminate the recess or prolong the day's session and require that the testimony continue without interruption. Or, the prosecutor could, within appropriate limits,

> cross-examine a defendant as to the extent of any

> "coaching" during a recess. . . . Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Id. at 89-90. The *Geders* Court concluded that in light of the other methods for countering the possibility of coaching, the lengthy overnight ban imposed on communications between Geders and his attorney was impermissible:

> To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel. . . .
>
> . . . . We hold that an order preventing petitioner from consulting his counsel "about anything" during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.

Id. at 91. The *Geders* Court noted that it did not need to, and did not, deal with limitations imposed in other circumstances.

In *Perry*, the Court concluded that the trial court's order that the defendant not consult with his attorney during a 15-minute recess was permissible:

> [T]he Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to inter-

rupt the trial for a few minutes.

488 U.S. at 284-85. The Court distinguished *Geders* on the basis that a long, overnight recess such as was at issue there would normally be used for discussion of a number of other important matters, and a ban during such a period, covering communication on all topics, was too severe a restriction:

> [T]he normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the *367 defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. See *Geders v. United States*, 425 U.S. at 88. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right.

488 U.S. at 284. The *Perry* Court concluded that, in contrast, "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." *Id.* The Court also noted that, "[a]lternatively, the judge may permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony." *Id.* n.8.

We conclude that *Geders* and *Perry* stand for the principle that the court should not, absent an important need to protect a countervailing interest, restrict the defendant's ability to consult with his attorney, but that when such a need is present and is difficult to fulfill in other ways, a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible.

In the present case, the problem addressed by the state trial court's limited gag order was far more troubling than the possibility of witness coaching involved in *Geders* and *Perry*, for intimidation of witnesses raises concerns for both the well-being of the witness and her family and the integrity of the judicial process. Such safety concerns have been held to justify a number of other types of intrusions on a defendant's normal access to information. For example, the court may properly allow the government to withhold the identity of persons who have furnished information of criminal activities to law enforcement officials where there is a legitimate concern for the safety of the informant. *See, e.g., Roviaro v. United States*, 353 U.S. 53, 59-62 (1957); *United States v. Napolitano*, 761 F.2d 135, 139 (2d Cir.), *cert. denied*, 474 U.S. 842 (1985). Or, on a similar showing of concern for a witness's safety, the witness's address, generally an appropriate subject of defense inquiry, *see, e.g., Smith v. Illinois*, 390 U.S. 129, 131 (1968), may properly be withheld, *see, e.g., United States v. Cavallaro*, 553 F.2d 300, 304 (2d Cir. 1977). For similar reasons, the trial court may sometimes empanel an anonymous jury. *See, e.g., United States v. Thai*, 29 F.3d 785, 800-01 (2d Cir.) (anonymous jury justified by evidence of the defendants' acts of intimidation toward their crime victims, their attempts to kill certain of those victims, the murder of one robbery victim because of his refusal to retreat from his complaints to the police, and the fact that many members of the defendants' gang remained at large), *cert. denied*, 513 U.S. 977 (1994).

Nor is the interest in the integrity of the judicial process so easily protected when the danger is that the defendant will so intimidate the witness that she either decides to give testimony that is false, incomplete, or misleading, or refuses to testify at all. If the defendant's intimidation causes the witness to give false or misleading testimony, cross-examination may or may not bring out the truth. But in either event the record will contain false evidence whose effect may be to produce an unjust

decision.

If the defendant's intimidation causes the witness not to testify, the loss of her testimony may, to a degree, be offset by the introduction of the witness's prior grand jury testimony, *see, e.g., United States v. Mastrangelo*, 693 F.2d 269, 272-73 (2d Cir. 1982), or of hearsay evidence *368 from a law enforcement officer or a prosecutor as to the witness's prior unsworn statements, *see, e.g., United States v. Aguiar*, 975 F.2d 45, 46-47 (2d Cir. 1992). However, the admission of such prior statements may well be an inadequate substitute for the witness's live testimony, and we consider it well within the proper bounds of the trial court's discretion to attempt instead to forestall the witness intimidation. Most recently, in *United States v. Padilla*, 2000 WL 135071 (2d Cir. Feb. 7, 2000), at *2-4, this Court has upheld a district court's order temporarily barring counsel from informing their clients of the existence of an ongoing investigation into allegations of witness and jury tampering. *See also id.* at *2 (investigation was revealed to the defendants when it became relevant to their witness-selection decisions and to the nature of the cross-examination that could be expected if the defendants themselves were to testify).

We conclude that valid concerns for the safety of witnesses and their families and for the integrity of the judicial process may justify a limited restriction on a defendant's access to information known to his attorney.

In the present case, the record included evidence that Hill had complained to the prosecutor or to law enforcement agents that associates of Morgan visited her in mid-May following her suppression hearing testimony and indicated that her family would be harmed if she testified against Morgan at trial; that on May 30, the day Hill was first scheduled to testify, Morgan had asked her, "Are you with me or what?" (Tr. 162); and that later that day, after Hill initially declined to testify, Morgan told her, "You don't have to worry about noth-

ing. You took good care of it" (Tr. 249-50). The evidence was ample to cause concern that Morgan had engaged in, and was continuing to engage in, attempts to intimidate Hill into not testifying.

The restriction imposed on Morgan to alleviate that concern was substantively quite limited. Though the nondisclosure order covered an overnight recess, it dealt with a single fact: that Hill, after her second change of heart, was expected to testify the following day. There was no blanket prohibition against communication between Morgan and his attorney; there was no restriction on their ability to discuss any other facet of the case. It does not seem likely that the order would have caused any impairment of defense counsel's preparation for Hill's testimony. Hill had been called to testify on May 30, and presumably defense counsel had been prepared to cross-examine her that day. Nor was there any impairment of the ability of Morgan—who was present at the *Sirois* hearing—to defend against the allegations that he and his associates had engaged in intimidation attempts. The only restriction imposed was that counsel not inform him that those attempts would apparently be unsuccessful.

We do not see that other types of restrictions would have sufficed in the circumstances of this case. Morgan's messengers remained at large, and the whereabouts of Hill and her family were obviously known to them. There was no possibility of simply continuing with the trial without a recess until Hill could testify, for Hill required representation of counsel with respect to the potential invocation of her privilege against self-incrimination, and the court had not yet succeeded in obtaining counsel for her.

Given the evidence of threats to and intimidation of Hill by Morgan and his associates, and the circumstances of the case, we conclude that the trial court's order that counsel simply not inform Morgan that Hill had decided to testify after all was not an unreasonable

application of the principle established in *Geders* and *Perry*. Accordingly, we affirm the district court's rejection of Morgan's assistance-of-counsel claim.

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B. *Exhaustion of the Confrontation Claim*

With respect to Morgan's contention that his confrontation right was violated by the trial court's precluding him from calling Smith as a witness and from cross-examining Hill as to whether her inculpating testimony was the product of threats and coercion, we disagree with the district court's view that that claim had not been exhausted.

The exhaustion requirement imposed by 28 U.S.C. § 2254(b)(1) means generally that before seeking a writ of habeas corpus in federal court, a state prisoner must first have presented his claim to the highest court of the state. *See, e.g., Grey v. Hoke*, 933 F.2d 117, 119 (2d Cir. 1991); *Pesina v. Johnson*, 913 F.2d 53, 54 (2d Cir. 1990) (per curiam). In New York, a defendant who has appealed his conviction to the Supreme Court's Appellate Division may seek review of his conviction by applying to the Court of Appeals for a certificate granting leave to appeal. *See* N.Y.Crim. Proc. Law § 460.20 (McKinney 1994). Under court rules, the initial application is to be sent to the Chief Judge, who then assigns the application to a particular judge. *See* N.Y. Ct. Rules § 500.10 (McKinney 1999). The Clerk of Court thereafter informs the defendant or his attorney which judge has been assigned the application; supplemental arguments, if any, are usually sent directly to the judge so designated.

In order to exhaust his claim before the state's highest court, a defendant must give that court a fair opportunity to pass on his federal claim. *See, e.g., Picard v. Connor*, 404 U.S. 270, 275 (1971); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (per curiam); *Grey v. Hoke*, 933 F.2d at 119; *Daye v. Attorney General*, 696

F.2d 186, 190-92 (2d Cir.1982) (en banc). In *Grey v. Hoke*, we considered a petitioner who had sent the Court of Appeals a letter requesting leave to appeal; his letter mentioned only one claim, and it attached his Appellate Division brief which had argued that claim along with two others. We held that the submission was insufficient to inform the Court of Appeals that leave was being sought with respect to claims other than the sole claim mentioned in the letter.

> The fair import of petitioner's submission to the Court of Appeals . . . was that the other two [claims] had been abandoned. The only possible indication that the other two claims were being pressed was the inclusion of a lengthy brief originally submitted to another court. This did not fairly apprise the court of the two claims. We decline to presume that the New York Court of Appeals has "a duty to look for a needle in a paper haystack."

933 F.2d at 120 (quoting *Mele v. Fitchburg District Court*, 850 F.2d 817, 822 (1st Cir.1988)).

In the present case, Morgan appealed his conviction to the Appellate Division, asserting contentions in a brief filed by his new counsel, Rosali Vazquez of the Legal Aid Society, and in a supplemental brief filed *pro se*. The *pro se* brief included the contentions that the trial court had improperly precluded Morgan from impeaching Hill with questions as to whether the prosecution was forcing her to testify untruthfully and improperly refused to allow him to present the testimony of Smith. After the Appellate Division affirmed, Morgan sought leave to appeal to the New York Court of Appeals, in a letter from his attorney to the Chief Judge. After briefly describing the judgment of conviction and the Appellate Division's affirmance, the letter concluded as follows:

> I am enclosing copies of the briefs filed in the Appellate Division and that Court's order and

> opinion. Please advise me of the judge designated to decide this application so that I may send that judge a follow-up letter in support of the application. We request this Court to consider and review *all issues* *370 *outlined in defendant-appellant's* brief and *pro se supplemental brief.*

(Letter from Rosali Vazquez to Chief Judge Sol Wachtler, dated October 10, 1991 ("Vazquez's October 10 Letter"), at 1-2 (emphasis added).)

Thereafter, Vazquez was informed in a letter from the Clerk of the New York Court of Appeals that Morgan's case had been assigned to Associate Judge Stewart F. Hancock, Jr. The letter continued:

> Any papers to be relied on in furtherance of your application, such as supplemental arguments or a request for an oral hearing, should be in letter form sent directly to the Judge named above unless they have already been forwarded with the application.

(Letter from Donald M. Sheraw, Clerk of the New York Court of Appeals, to Rosali Vazquez, dated October 17, 1991 ("Court Clerk's Letter").) After receiving the Court Clerk's Letter, Vazquez sent Judge Hancock a follow-up letter, which began by stating that "[t]he question presented by this case is whether the court deprived appellant of his right to counsel when it prevented counsel from communicating with appellant overnight regarding the complaining witness's decision to testify." (Letter from Rosali Vazquez to Judge Stewart F. Hancock, Jr., November 7, 1991 ("Vazquez's November 7 Letter"), at 1). After discussing that issue, Vazquez stated that she

> would also like to draw your Honor's attention to Point I G in appellant's supplemental *pro se* brief [which concerned Morgan's alleged right to be present at the questioning of the second court officer who reported comments by Morgan to Hill]. After appellant filed his *pro se* brief, this Court

> ruled in *People v. Turaine*, 78 N.Y.2d 871 (1991), that a defendant had a right to be present at a hearing to elicit facts surrounding alleged intimidation so that the court could determine its admissibility at trial. It is appellant's contention that *Turaine* mandates that he be given a new trial.

(Vazquez's November 7 Letter at 2.)

The State opposed Morgan's request for leave to appeal, arguing, *inter alia*, that "[t]he Appellate Division also properly concluded that . . . the claims raised in [Morgan's] *pro se* supplemental brief did not warrant reversal." The Court of Appeals denied leave to appeal without comment. *See* 79 N.Y.2d 861, 580 N.Y.S.2d 733 (1992).

In addressing the confrontation claim asserted in Morgan's habeas petition, the district court, relying in part on *Grey v. Hoke*, concluded that the claim had been procedurally forfeited in light of Vazquez's November 7 Letter, ruling that the claim had not been fairly presented to the Court of Appeals. The district court stated:

> If there had not been a follow-up letter, this leave application could have arguably been sufficient to alert the Court of Appeals to the fact that petitioner sought leave with respect to each of the issues raised in the *pro se* supplemental brief. *See Meatley v. Artuz*, 886 F. Supp. 1009, 1013-14 (E.D.N.Y.1995) (holding that leave application which did not refer to any specific claim, but attached Appellate Division brief, "fairly presented" claims raised in Appellate Division to Court of Appeals). The November 7, 1991 letter, however, specifically addressed only two of petitioner's claims in a way that clearly suggested that these were the only issues on which leave was sought.

1998 WL 315135, at *8.

We disagree for several reasons. First, the present case differs significantly from *Grey v. Hoke*, in which the

request for leave to appeal was made in a letter that mentioned one issue but did not mention two others as to which habeas relief was eventually sought. In the present case, in contrast, Morgan's initial letter to the Court of Appeals expressly "request[ed] this Court to consider and review *371 all issues outlined in defendant-appellant's brief and *pro se* supplemental brief" submitted to the Appellate Division. (Vazquez's October 10 Letter at 2.) That statement was sufficiently specific to alert the Court of Appeals that Morgan sought review of all of the issues raised in his *pro se* supplemental Appellate Division brief.

Second, we do not think it appropriate to infer that the New York Court of Appeals would construe counsel's second letter as eliminating issues as to which review had been expressly requested. The reference in the Court Clerk's Letter to "supplemental" arguments appears to indicate that follow-up letters would be considered in addition to, not in lieu of or as a limitation on, the issues raised in counsel's initial letter.

Finally, we think the substance of the second letter's reference to Point I G of the *pro se* brief made clear that that reference was meant simply as a supplement. In referring to that point, the letter simply called the Court's attention to a case that had been decided by the Court of Appeals "[a]fter appellant filed his *pro se* brief" (Vazquez's November 7 Letter at 2), and stated it was Morgan's contention that reversal was required by that new case.

Because counsel's initial letter expressly sought review of "all issues outlined in defendant-appellant's... *pro se* supplemental brief" (Vazquez's October 10 Letter at 2), we conclude that Morgan fairly presented to the Court of Appeals the present confrontation claim, which was argued in his *pro se* supplemental brief, and thus satisfied the exhaustion requirement.

Whether the limitations that were imposed on the proposed cross-examination and impeachment of Hill

infringed Morgan's right to confront his accuser is a matter that goes to the merits. The district court described this claim as "not without merit," 1998 WL 315135, at *4, although it "believe[d] that the line of questioning precluded by the trial judge would have been a disaster for petitioner," *id.* at *12. The court declined, however, to "reach any final conclusion because a hearing may be required to at least determine what Denise Hill, if not Gladstone Smith, would have said if questioned." *Id.*

We are skeptical, for two reasons, of the need for further exploration as to Gladstone Smith. First, although admissible evidence as to whether Hill's testimony was fabricated would have been central to an assessment of her credibility, much of Smith's testimony as described in Morgan's offer of proof would have been collateral. Second, it is questionable whether any of Smith's testimony would have been admissible since there was no suggestion that she had any personal knowledge of the facts, and her testimony as to what Hill had told her would appear to be hearsay. In the circumstances, the trial court's denial of the continuance necessary to bring Smith to court seems well within the bounds of discretion.

We are also skeptical as to whether habeas could properly be granted on the confrontation claim with respect to the cross-examination of Hill. Hill herself, of course, could have been questioned as to the truth of her testimony; we cannot agree with the trial court's view that that issue was "collateral" (Tr. 526). However, it is hardly clear from the transcript pages cited to us by Morgan that the trial court was adequately apprised that the issue on which he wished to confront Hill was the truth or falsity of her testimony. Defense counsel asked Hill whether anyone had threatened or forced her to testify; but pressure merely to testify does not indicate pressure to falsify. Standing alone, therefore, defense counsel's question would not have elicited probative information; and it would surely, as the trial

court indicated, have opened the door to devastating questioning by the prosecution as to threats by Morgan to prevent Hill from testifying. We leave it to the district court, in the first instance, to determine (a) whether defense counsel adequately alerted the trial court that the ultimate issue he *372 sought to probe in this line of questioning was the truthfulness or falsity of Hill's testimony (assuming that was his intention), (b) if so, whether the limitation on the cross-examination of Hill improperly abridged Morgan's right to test the truthfulness of Hill's testimony and to bring out her biases and motivation for her testimony, *see generally Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974), and (c) if there was any constitutional error, whether it was harmless.

CONCLUSION

For the reasons stated above, the judgment of the district court is affirmed to the extent that it dismissed petitioner's claim that he was deprived of his right to the assistance of counsel, and is vacated to the extent that it dismissed the confrontation claim for lack of exhaustion. We remand for consideration of the confrontation claim on the merits.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. CV-96-4106 (ERK)

May 27, 1998

DARIUS MORGAN,

Defendant-Petitioner,

–v.–

FLOYD BENNETT,

Respondent.

Sharon Weintraub Dashow, George Sheinberg,
Brooklyn, NY, for plaintiff.

Charles J. Hynes, District Attorney for Kings County,
Brooklyn, New York, by Roseann B. MacKechnie,
Amy Appelbaum, Camille O'Hara Gillespie,
Asst. District Attorneys, for defendant.

MEMORANDUM AND ORDER

KORMAN, J.

*1 Petitioner, Darius Morgan, seeks a writ of habeas corpus, challenging his conviction for murder in the second degree and attempted murder in the second degree. The conviction arose out of a shooting that took

place on February 27, 1987 inside apartment 11-H at 9 Monument Walk in Brooklyn. At the time, petitioner was present along with four others, Denise Hill, Rachel Layne, and two brothers identified only as "Monk" and "Randy." At about 6:30 a.m., irate after he discovered that his car was missing, petitioner drew a gun and asked "Monk" and "Randy" whether they would implicate him if he shot the two women. When the men answered in the negative, petitioner shot Denise Hill in the knee and back, and then chased Rachel Layne into a bedroom where he shot her three times, killing her. Petitioner then fled the apartment in which his presence had been confirmed by forensic evidence. Tr. 631.

In response to instructions from "Monk", Denise Hill initially told the police that the apartment was a drug house, she had left the door unlocked, and that two unidentified males entered in an attempted drug robbery and just "started shooting." (Tr. 378, 380, 569). Only about fifteen minutes later, however, while Hill was still lying in a hospital bed, she told Detective Montemarano of the New York Police Department the same narrative of the shooting related above and to which she ultimately testified at trial. (Tr. 381, 570-72). At the trial, Detective Montemarano described Denise Hill's bedside statement as follows:

> THE WITNESS: She stated that while she was in the apartment, she was there with the deceased and three other males; that at approximately—I really don't recall the time, I think it was about 2:00 in the morning, 2:00 A.M., that an argument ensued; it was the males, they were arguing. She said that the individual known to me as Shareef [petitioner] left the apartment, and I believe she stated went to his mother's apartment. Although she couldn't see this, this is what she heard; she heard banging on the mother's door. Apparently was unable to gain entry. She then heard the elevator go down.

Still later, Shareef came back to the apartment. As far as the times are concerned, right now I'm not really 100 percent sure. I think it was maybe 4:00.

* * *

Okay. Originally she stated it was 6:00 o'clock in the morning that he first left the apartment. It was shortly thereafter that he returned. He approached the other two individuals that were in the apartment—they were both brothers, I really don't recall their names at the time—had a conversation with [them] and he had asked them if it would be all right if he wasted the girls. They had no objections. He walked into what would be called, I guess, the living room. The two girls were on the couch. He removed a revolver, fired at the witness first, striking her twice. The deceased got off the couch screaming, ran to another room and there were numerous shots that were fired.

*2 He, in turn, was directed by the two brothers to leave the apartment and they stated they would take care of this and he left.
(Tr. 571-73).

Over two years elapsed between the shooting and the trial. When called to the stand initially, Denise Hill unexpectedly refused to testify. She told the prosecutor that she was "terrified of testifying against the defendant" and that she "feared for her family's safety and especially the safety of her daughter." (Tr. 233). According to the Assistant District Attorney, Hill told her that two weeks earlier, two of petitioner's associates had visited her in jail, including one known as "Chucky," and told her that they knew she was the main witness in the case, and that petitioner "was facing too much time." (Tr. 234). The men asked about Hill's eight-year-old daughter and off-handedly referred

> to the safety of her family and daughter. The prosecutor told the judge that one of these men had made several overtures to Hill's family members, including her mother and her sister. (Tr. 235). To enable the prosecutor to meet with Denise Hill the following day—presumably to convince her to testify—the judge signed an order directing that Denise Hill be brought to the District Attorney's office.[1] (Tr. 242, 247). Before adjourning for the day the judge warned petitioner—whom she had already admonished for having improper contact with Denise Hill earlier in the day (Tr. 161-62)—not to speak with Hill at all. (Tr. 243).

Despite the judge's order, petitioner spoke with Denise Hill in the pens and on the way to Rikers Island that very evening. Their exchanges form the basis for two of the claims raised by petitioner, namely, his claims that he was excluded from a material stage of the trial and that he was deprived of the effective assistance of counsel. Thus, on May 31, almost immediately after Denise Hill first refused to testify, petitioner blew several kisses towards Ms. Hill and had several words with her in the presence of Court Officer DeBenedictus. The following morning, the judge called both attorneys and Officer DeBenedictus, into chambers. Petitioner was not present. The judge then observed that she had already admonished petitioner not to speak with Hill, and continued:

> THE COURT: In spite of that admonition, last night when we recessed at about 4:55, Officer DeBenedictus brought the defendant back to the pen and once again he saw Ms. Hill. And the first thing he did, he threw three—how many kisses?

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[1] At the time of trial, Denise Hill was incarcerated, apparently as a result of a 1987 armed robbery conviction in New Jersey. (Tr. 345, 449). She was being held at Rikers Island during the course of trial, and was transported to and from the "pens" at the courthouse, where her encounters with petitioner occurred.

OFFICER DEBENEDICTUS: *Just one. Well,* he had his mouth like (indicating).

THE COURT: He puckered and he kissed at least once and then made the following statement addressing Ms. Hill: "I love you too. You don't have to worry about nothing. You took good care of it." And that was the only conversation by the defendant. Was there any response by Ms. Hill?

OFFICER DEBENEDICTUS: I wasn't looking at her.

THE COURT: Did you hear her?

OFFICER DEBENEDICTUS: No. She was 20 feet away.

*3 THE COURT: Did the defendant speak in a voice loud enough to be heard?

OFFICER DEBENEDICTUS: Yes. (Tr. 249-50).

Although defense counsel complained that petitioner was not present, the trial judge then heard legal argument from the prosecutor regarding Denise Hill's decision whether or not to testify. The judge indicated that petitioner's presence was not required because the proceeding was legal argument, rather than an evidentiary hearing.

The same afternoon, the prosecutor informed the judge that Denise Hill "was still afraid to testify but that she would take the stand and testify." (Tr. 280). Nevertheless, for reasons that are unclear, the judge determined to go forward with a *Sirois* hearing. The purpose of such a hearing is to determine whether a defendant's misconduct is responsible for a witness' unavailability or unwillingness to testify, thus providing a basis for the admission of hearsay testimony of that witness. *See Matter of Holtzman v. Hellenbrand*, 460 N.Y.S.2d 591, 92 A.D.2d 405 (2d Dept.1983). The hearing was held later that day.

At the *Sirois* hearing, the sole witness was Detective Catherine Latawiek, who had spoken with Denise Hill several times, most recently that same morning. (Tr. 292). Detective Latawiek testified at length as to threats made to Denise Hill and her family.[2] She testified that two of petitioner's associates had paid an unexpected visit to Denise Hill in prison two weeks earlier, and had told Hill that petitioner was facing "too much time." The men said that if she testified, they could not guarantee the safety of her family. Detective Latawiek also testified that Denise Hill told her that petitioner had kissed her in the holding cell the previous evening and asked her if Chucky (one of the prison visitors) had given her any money. He also told Hill that he didn't mean to shoot her, because if he did, he would have shot her in the head. (Tr. 300). Later that same evening, on the bus returning to Rikers Island, Hill had asked petitioner whether her family would also be killed if she testified. (Tr. 301). Petitioner did not respond to this question. Finally, Detective Latawiek testified about several incidents related to her by Denise Hill in which Hill's mother and sister were approached by associates of petitioner. Defense counsel then had a full opportunity to cross-examine Detective Latawiek.

No other witnesses testified at the *Sirois* hearing. The judge did not rule on the application to admit Denise Hill's prior statements in lieu of her testimony, because the following morning Denise Hill agreed to testify. (Tr. 330, 344-486). Hill implicated petitioner on direct examination, and was cross-examined at length by defense counsel (the cross-examination fills over ninety pages of the record). Ultimately, the jury found petitioner guilty of murder in the second degree and attempted murder in the second degree. He was sentenced to twenty-five years to life for the murder and ten to

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[2] Normal rules of evidence do not apply in a *Sirois* hearing. *See People v. Geraci*, 85 N.Y.2d 359, 369 n. 4, 625 N.Y.S.2d 469, 475 n. 4, 649 N.E.2d 817 (1995).

twenty years for the attempted murder.

*4 On appeal, the Legal Aid Society filed a brief on his behalf raising two claims. In addition, petitioner filed a *pro se* supplemental brief, in which he raised, *inter alia*, the claim that the trial judge impeded the defense and denied petitioner a fair trial by limiting the cross-examination of Denise Hill, the sole eyewitness testifying in the case, and by denying the defense application to call a witness, Gladstone Smith, who would testify that Hill had been pressured to testify against petitioner. On September 30, 1991, the Appellate Division affirmed the conviction. *People v. Morgan*, 176 A.D.2d 359, 574 N.Y.S.2d 592 (2d Dept.1991). Leave to appeal the Court of Appeals was denied by Judge Hancock. *People v. Morgan*, 79 N.Y.2d 861, 580 N.Y.S.2d 733, 588 N.E.2d 768 (1992).

In a Memorandum and Order filed on September 12, 1997, I suggested that only one of the claims raised in petitioner's supplemental brief was properly preserved for review. This was the claim relating to his absence from the brief proceeding in chambers that preceded the *Sirois* hearing. The other arguments were not adequately raised in the petitioner's application for leave to appeal to the Court of Appeals. Nevertheless, only one of those had any arguable merit.[3] This was petitioner's claim that the trial judge impeded the defense and denied petitioner a fair trial by limiting the cross-examination of Denise Hill and denying the defense request to call Gladstone Smith as a witness. I then set the matter down for a further discussion of that issue. The resulting discussion served to clarify my understanding of the record.

In the present Memorandum and Order, I specifically

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[3] These arguments, which were raised in Points I, II, VI and VIII of Petitioner's brief here, are without merit for the reasons sufficiently detailed in the District Attorney's brief in the Appellate Division. The argument raised in Point VII relating to the use of Denise Hill's prior testimony is addressed infra at page 23 n.7.

address the two claims that were properly preserved, as well as the sole colorable unpreserved claim raised in the supplemental brief. I conclude that the two properly preserved claim are without merit and do not warrant habeas corpus relief. While the single colorable claim in the supplemental brief is not without merit, I adhere to my initial suggestion that this issue was procedurally forfeited.

DISCUSSION

I. THE PRESERVED ISSUES

A. *Exclusion from Proceedings*

Petitioner claims that his exclusion from the brief proceeding at which Officer DeBenedictus was questioned violated his right to be present at all material stages of the trial. *See Rushen v. Spain*, 464 U.S. 114, 117-18 (1983). This claim fails because the proceeding was immaterial, and because petitioner can show no prejudice resulting from his exclusion from it. The brief questioning of Officer DeBenedictus had no bearing on the trial itself. The trial judge specifically ruled that the questioning was merely a part of the prosecutor's application for a *Sirois* hearing and that nothing said there would affect the outcome of the *Sirois* hearing. More significantly, because the *Sirois* hearing never resulted in any ruling, much less one that affected the trial, and because Denise Hill ultimately testified at trial, the proceedings in chambers were not material to the case against petitioner.

*5 The Supreme Court has held that the harmless error rule applies to less-than-total restrictions on a defendant's right to be present at trial. *See Rushen*, 464 U.S. at 117 n.2 ("[V]iolations of the right to be present during all critical stages of the proceedings [are] . . . as with most [violations of] constitutional rights, . . . subject to harmless-error analysis, . . . unless the

deprivation, by its very nature, cannot be harmless.") (citations omitted); *see also Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir.1996) (defendant's exclusion from in camera examination of witness who testified at trial was subject to harmless error rule), *cert. denied*, __ U.S. __ (1997). "[T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record." *United States v. Gagnon*, 470 U.S. 529, 526-27 (1985).

The brief questioning of Officer DeBenedictus in this case was even less significant than the hearing held to be harmless error in *Yarborough*. There, the trial judge took brief testimony from a witness outside the presence of the defendant, but his attorney was present. *Yarborough*, 101 F.3d at 895. The questioning concerned whether the witness' presence in the courtroom during a previous witness' testimony would influence his own. The witness ultimately testified against the defendant, and the Second Circuit applied the harmless error rule: "[I]f this incident was error, it was of such minimal importance to the fair structure of the criminal proceeding that it cannot fall within [the] classification of structural error[ ]." *Id.* at 898. The same is true here. Moreover, petitioner's related claim, that he was excluded from the *Sirois* hearing, Petitioner's Brief at 21, is not only contradicted by the transcript in which petitioner's counsel notes his presence, Tr. 286, but is likewise harmless because nothing came of the hearing.

B. *Deprivation of Right to Counsel*

Petitioner also claims that the trial judge improperly directed defense counsel not to inform petitioner that Denise Hill was likely to testify. This order allegedly deprived petitioner of his right to effective assistance of counsel. Specifically, because of the limited "gag order", petitioner argues that he was unable to assist his lawyer in preparing to cross-examine Hill. Petitioner's Brief at 22-23. Petitioner relies primarily on *Geders v. United States*, 425 U.S. 80 (1976), where the Supreme Court

held that an order completely barring a defendant from conferring with counsel during an overnight recess between the defendant's direct and cross examination violated the Sixth Amendment.

Subsequently, in *Perry v. Leeke*, 488 U.S. 272, 280 (1989), the Supreme Court distinguished *Geders*. In *Perry*, as in *Geders*, the defendant testified in his own defense. During a fifteen- minute recess, the trial judge prohibited him from communicating with his lawyer—or anyone else—in any way. *Id.* at 274. The Supreme Court held that the legitimate justification of preventing unethical witness "coaching"—which was the only plausible subject of discussion between lawyer and client during the fifteen-minute recess—justified the complete prohibition. *Id.* at 282. *Perry* distinguished *Geders* as a case that implicated the defendant's right to consult with his lawyer on the full range of matters one would expect a defendant to discuss during an overnight recess, "such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* at 284. Although the defendant-witness might still discuss his ongoing testimony with his lawyer in the *Geders*-type case, the interest in preventing "coaching" could not outweigh the defendant's broader right to consult with his lawyer. In *Perry*, however, the defendant's ongoing testimony was the only topic of conversation curtailed by the ruling, and the trial court's truth-seeking function outweighed the limited restriction placed on the right to counsel in those circumstances.

*6 Like *Perry*, the prohibition in this case did not prevent defendant from conferring with his counsel "altogether." *Perry*, 488 U.S. at 280 (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984)). Indeed, it did not preclude petitioner from seeking any advice or guidance from his lawyer, and his lawyer was free to discuss anything relating to the trial except the fact that Denise Hill was again likely to testify. This restriction was justified by the prior threats against Denise Hill.

Moreover, even if it was unjustified, it did not prejudice petitioner in any way.

While the Supreme Court has suggested that a petitioner need not prove prejudice when he is deprived of his right to confer with counsel "altogether," *see Perry*, 488 U.S. at 280; *Jones v. Vacco*, 126 F.3d 408 (2d Cir.1997) (calling a complete ban on communication over four days a "structural defect"), this case is not about denying a defendant the right to confer with counsel; rather, it is about denying a defendant access to a single piece of information. As such, it is much closer to cases where a defendant has been denied access to evidence material to his defense. In those cases, even where the material was exculpatory, the Second Circuit has held that reversal was not required where the evidence was produced within a sufficient time for the defense to make use of it. *See United States v. Barnes*, 604 F.2d 121, 150 (2d Cir.1979) (finding no Brady violation where material was given to defense counsel at the end of witness' testimony, because defendant could have recalled witness for further cross-examination), *cert. denied*, 446 U.S. 907 (1980); *United States v. Cowles*, 503 F.2d 67, 68 (2d Cir.1974) (finding that defendant was not prejudiced by surprise witness testimony where counsel was offered and declined a continuance), *cert. denied*, 419 U.S. 1113 (1975); cf. 18 U.S .C. § 3500(a), (b) government not required to produce witness statements until witness has completed direct testimony).

The only effect of the "gag" order was to deprive petitioner (not his lawyer) of information that Denise Hill again intended to testify against him. Petitioner's claim that he was somehow prevented from helping prepare the cross-examination of Denise Hill ignores the fact that Denise Hill was previously called to testify at the trial. (Tr. 230). Only when she was first called did it become apparent that she was unwilling to testify. Counsel must have been prepared to cross-examine Denise Hill when she was first called, and he had ample opportunity to consult with petitioner in preparation for

her testimony. In fact, the "gag" order ended when Denise Hill was called to the stand for the second time. Because the trial judge recessed for lunch between direct and cross examination, we may presume that petitioner had an opportunity to consult with his attorney as to any matters relevant to potential cross-examination. Moreover, the transcript reveals that counsel consulted directly with his client at least once during his cross-examination of Denise Hill. (Tr. 431). If he required more time to prepare and consult with petitioner between direct and cross, particularly in light of the previously-imposed gag order, defense counsel could have requested it. The failure to do so plainly shows that petitioner was not prejudiced. Under these circumstances, there is no more reason to set aside the judgment of conviction than if exculpatory material had been belatedly produced at trial.

*7 Moreover, the Appellate Division's rejection of petitioner's claim must be evaluated in light of the standards applicable to the resolution of petitions filed after April 24, 1996, the effective date of the amendments to 28 U.S.C. § 2254 made by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132. Specifically, Section 2254 provides that a petition for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ." 28 U.S.C. § 2254(d)(1). As Judge Posner recently observed: "[t]he statute commends deference to the state court's judgment by using the word 'unreasonable', which is stronger than erroneous and may be stronger than clearly erroneous." *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.), *cert. denied*, __ U.S. __. In this case, the Appellate Division held that

> [t]he ruling in issue here was of very limited scope. The court did not prohibit all conversations be-

> tween the defendant and his attorney, but only discussion relating to the likelihood that the witness in question would testify . . . cf., *Geders v. United States*, 425 U.S. 80. Under the circumstances present here there was no error of law requiring reversal (*see, Perry v. Leeke*, 488 U.S. 272).

People v. Morgan, 176 A.D.2d at 359-60, 574 N.Y.S.2d at 593. The Appellate Division's ruling was not an unreasonable application of *Perry* and *Geders*, and, accordingly, petitioner's right to counsel claim must be denied.

II. THE LIMITATION ON CROSS-EXAMINATION OF DENISE HILL AND THE ADMISSIBILITY OF GLADSTONE SMITH'S TESTIMONY

Petitioner also argues that the trial judge improperly curtailed defense counsel's cross-examination and impeachment of Denise Hill. This is one of the claims raised in petitioner's *pro se* brief in the Appellate Division. Before turning to the merits of this claim, I set forth here the reasons for my conclusion that the issue was not properly raised in petitioner's application for leave to appeal to the Court of Appeals.

By letter dated October 10, 1991, the Legal Aid Society applied for leave to appeal to the New York Court of Appeals on behalf of petitioner. Consistent with the applicable rules, the letter was addressed to the Chief Judge and was sent to the attention of the clerk of the court for designation of a judge to rule on the application. McKinney's 1997 N.Y. Rules of Court § 500.10(a) (22 N.Y .C.R.R. 500.10(a)). Anticipating such a designation, the leave letter was bare bones in nature. Specifically, counsel asked that she be advised of the judge designated so that she could "send that judge a follow-up letter in support of the application" which requested that the Court of Appeals "consider and

review all issues outlined in defendant-appellant's brief and *pro se* supplemental brief."

*8 The initial leave letter appears to reflect the usual practice of filing an application that does not contain any argument and then filing a more detailed supplemental letter after a judge is designated to hear the application.[4] Accordingly, on November 7, 1991, after being apprised that the application had been assigned to Judge Hancock, petitioner's counsel addressed a follow-up letter to him in which she specifically identified "the question presented by this case" as follows:

> The question presented by this case is whether the court deprived appellant of his right to counsel when it prevented counsel from communicating with appellant overnight regarding the complaining witness's decision to testify.

After detailing the factual basis for the claim, the letter continued by arguing that "[l]leave should be granted so that the Court might address whether there is a distinction in cases where the ban prohibits counsel from discussing with the defendant his testimony during a break in his cross- examination."

The letter also drew attention to "Point IG in appellant's supplemental *pro se* brief" and a recent case that supported the claim that a new trial was required because petitioner was denied his right to be present at a hearing to elicit facts surrounding petitioner's alleged intimidation of the principal witness against him. The pertinent part of the letter then concluded by asking that "[f]or the reasons stated above, we urge that leave to appeal be granted."

In a letter in opposition to the application for leave, dated November 15, 1991, the District Attorney ad-

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[4] The practice is described in a letter/memorandum in another habeas corpus case pending before me. *See* Letter of Jay L. Weiner, dated September 10, 1997 at p.2, filed in *Nieblas v. Smith*, 95 CV-3442. A copy of the letter has been made part of the record here.

dressed in detail the two issues raised in petitioner's second leave letter and concluded by arguing that "[t]he Appellate Division also properly concluded that ... the claims raised in [Petitioner's] *pro se* supplemental brief did not warrant reversal." On January 23, 1992, the application for leave to appeal was denied. *People v. Morgan*, 79 N.Y.2d 861, 580 N.Y.S.2d 733 (1992).

The October 10, 1991 letter applying for leave to appeal to the Court of Appeals, which was the first of two filed on petitioner's behalf by the Legal Aid Society, specifically incorporated petitioner's *pro se* supplemental brief and the remaining six claims. If there had not been a follow-up letter, this leave application could have arguably been sufficient to alert the Court of Appeals to the fact that petitioner sought leave with respect to each of the issues raised in the *pro se* supplemental brief. *See Meatley v. Artuz*, 886 F. Supp. 1009, 1013-14 (E.D.N.Y. 1995) (holding that leave application which did not refer to any specific claim, but attached Appellate Division brief, "fairly presented" claims raised in Appellate Division to Court of Appeals). The November 7, 1991 letter, however, specifically addressed only two of petitioner's claims in a way that clearly suggested that these were the only issues on which leave was sought. Indeed, had I been the judge to whom the leave application was assigned, I would have assumed that the only issues being pressed in the leave application were those alluded to in the letter of November 7, 1991.

*9 Thus, there is a serious question whether petitioner properly preserved the balance of the issues raised in the Appellate Division brief and, accordingly, whether those claims were exhausted in the state courts or procedurally forfeited. *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir.1991), and *Thebner v. Miller*, 788 F. Supp. 714 (E.D.N.Y.1992), are instructive. In *Grey*, the petitioner submitted a letter application to the Court of Appeals which specifically addressed his search and seizure claim, but also attached his Appellate Division brief, which had addressed two additional claims. *Grey*,

933 F.2d at 120. The Second Circuit found that the two claims not addressed in the letter application were not fairly presented to the Court of Appeals. *Id.* Relying on *Grey*, Judge Wexler came to the same conclusion in *Thebner v. Miller*. Petitioner's letter application there specifically addressed his search and seizure claim. Expressly referring to the Appellate Division brief which was enclosed with the letter, petitioner wrote: " 'Numerous other issues are raised in defendant-appellant's brief all of which deserve review by this court.' " 788 F. Supp. at 717. On these facts, Judge Wexler held that only the search and seizure claim was fairly presented to the Court of Appeals. *Id.*

The procedure followed by the Legal Aid Society on petitioner's behalf provides a more compelling case for finding a failure to exhaust than in *Thebner v. Miller*. The supplemental leave letter here plainly suggested that petitioner was relying on only the claims specifically raised in the letter. Such a suggestion defeats the purpose of requiring a habeas petitioner to first present his claims of error to the state courts. Because the judge to whom the leave application was assigned could reasonably assume that the only issues presented to him were those pressed in the supplemental leave letter, the remaining claims in petitioner's *pro se* Appellate Division brief were simply not exhausted and are now procedurally forfeited.

My reliance on the procedural forfeiture as a basis for rejecting the claims not properly raised in petitioner's application for leave to appeal to the Court of Appeals represents a departure from my usual practice. I prefer to pass over the procedural basis urged by the District Attorney and decide a habeas corpus petition on the merits. Nevertheless, these procedural bars cannot be overlooked in cases in which the petition would otherwise have to be granted. Moreover, when the merits raise issues that involve close calls and the necessity for evidentiary hearings, it seems to me the sounder course to dispose of the case on the procedural forfeiture

ground. This case falls within the latter category for the reasons that I now proceed to show in discussing the merits of petitioner's claim that the trial judge improperly curtailed his cross-examination of Denise Hill.

Hill was the sole eyewitness to testify at trial and her credibility was therefore central to this case.[5] Although she gave a contemporaneous prior statement consistent with her trial testimony, and a plausible explanation for the inconsistent statement she had given to the police a few minutes earlier, petitioner's trial counsel nevertheless asked Denise Hill whether "anyone threaten[ed] or force[d] you to testify in this case?" (Tr. 476).

*10 Before Denise Hill could answer, the trial judge called a sidebar, because she was concerned that defense counsel's question would "raise a hornet's nest in connection with threats" by opening the door to testimony that Hill had been threatened by petitioner's friends not to testify. (Tr. 477). The trial judge had previously excluded this evidence from the case. Subsequent colloquy made it plain that the trial judge would not permit Hill to be asked a more precisely worded question as to whether she had been threatened by the prosecutor and that she would not permit extrinsic evidence to rebut Hill's denial of such threats. The reason given for this ruling was that this evidence was "collateral." (Tr. 480).

Calling the issue of Hill's credibility "collateral", however, does not dispose of this issue. Where a witness' credibility is crucial to a case, evidence that suggests a reason or motive to lie is not "collateral". "Evidence of a witness' bias, interest or hostility, is not subject to the limitations of the so-called 'collateral matter rule.'" Prince, Richardson on Evidence § 6- 415 (11th Edition, Farrell) (collecting New York cases); *see also* Christo-

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[5] Although "Monk" and "Randy" were in the apartment at the time of the shooting, Denise Hill said that they would not testify because they feared they and their families would be killed if they did. (Tr. 260, 318).

pher B. Muller & Laird C. Kirkpatrick, Federal Evidence (2d Ed.) § 307 (collecting federal cases). Nevertheless, to obtain relief here petitioner must do more than show that the trial judge erroneously excluded relevant evidence. Instead, petitioner can prevail only if he can demonstrate that "'the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist.'" *Justice v. Hoke*, 90 F.3d 43, 47 (2d Cir.1996) (quoting *United States v. Agurs*, 427 U.S. 97, 112.

Unlike *Justice v. Hoke*, where the offer of proof came in the form of testimony elicited from a prospective witness and from a more explicit outline of the proffered testimony, here neither witness testified. Accordingly, there is no way of knowing from this record how Denise Hill would have answered defense counsel's question whether she was threatened or forced to testify. Indeed, in response to the suggestion of defense counsel that Denise Hill had been threatened by the government, the Assistant District Attorney emphatically denied any threats: "And I object to counsel [sic] reference that this witness was threatened to testify. This witness was threatened not to testify. The safety of her family has been threatened." (Tr. 480). Moreover, because the testimony of a witness may not be bolstered by a prior consistent statement, petitioner's desire to call Gladstone Smith suggests that he expected Hill to deny being threatened. According to petitioner, Gladstone Smith was

> an inmate who was on the same floor, they were separated by a rail, sort of a fish net-type of rail where you couldn't reach in but you could see, stated to the effect that this witness, Denise Hill, told her that the mother of the deceased, I think it was her stepmother, was forcing her to testify; that she didn't want to testify; and as a result of their forcing her, she was going on the stand, but she was not comfortable going on the stand because she was saying things that weren't true.

*11 (Tr. 523-24).

The trial judge decided preliminarily, (Tr. 526), and later definitively, that she would not allow the proffered testimony, the "offer of proof being allegedly that Miss Hill was forced and pressured into testifying in this case." *Id.* at 688. Referring to an earlier colloquy, the trial judge explained:

> I previously ruled when we had our pre-charge conference, that I would not permit introduction of such testimony, that being collateral.
>
> There is nothing to indicate that the witness, Denise Hill, concocted a story or manufactured the testimony that she gave. In fact, the District Attorney attempted to elicit on her direct examination that it was the defendant and friends of the defendant who were pressuring the witness Miss Hill not to testify.
>
> I would not permit that testimony to come in as that is collateral.

(Tr. 688).

Moreover, although the trial judge had signed a subpoena for Gladstone Smith, he was not produced by the Department of Corrections. This was apparently because the use of a subpoena, as opposed to a specific order of the trial judge, is not the appropriate way to obtain the appearance of a potential witness incarcerated at Rikers Island. Nevertheless, after a colloquy with respect to the defense's attempt to produce Gladstone Smith, the trial judge made the following ruling:

> The Court would not permit you, had this witness from Rikers Island been produced by Corrections, based upon the offer of proof that has been elicited by you, Counsel, I would not permit that testimony to be brought before the jury, as it is collateral. You have an exception. (Tr. 689).

Under these circumstances, it is simply not possible

to conclude that the excluded testimony would have altered the outcome at trial. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (holding that evidence is material on a Brady claim only "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'") (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).[6] The undisputed evidence at trial was that Denise Hill gave a statement to detectives at the hospital on the morning of the shooting (at which she was wounded). She and one of the detectives who took her statement testified at trial, and the statement was consistent with her trial testimony. Indeed, the admission of her bedside statements implicating petitioner is sufficiently compelling that petitioner argues in a separate point that it improperly "bolstered" Hill's testimony and was sufficiently prejudicial to warrant a new trial. Petitioner's Brief at 37-41.[7] Gladstone Smith was hardly someone of impeccable character and it is unclear what effect he would have had on the jury. Indeed, allowing the questioning of Denise Hill on this issue—and Gladstone Smith's testimony to contradict her (assuming she denied making the statement)—would surely have opened the door to the inflammatory testimony of threats Hill had received from petitioner and his associates to prevent her from testifying. Because Denise Hill was never questioned on this issue, and Gladstone Smith was not called, it is not possible to say with any certainty what would have happened. Indeed, for this reason, it has been suggested

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[6] This is the standard that applies here. *See Justice v. Hoke*, 90 F.3d at 47-48; *Taylor v. Curry*, 708 F.2d 886, 891 (2d Cir.) (citing *United States v. Agurs*, 427 U.S. 97, 112 (1976)), *cert. denied*, 464 U.S. 1000 (1983).

[7] Petitioner claims that the admissibility of these statements violated the Confrontation and Due Process Clauses. This argument is frivolous because the statements were clearly relevant, *see Estelle v. McGuire*, 502 U.S. 62 (1991), and Denise Hill was available for cross-examination. *California v. Green*, 399 U.S. 149, 158 (1970).

that, "[f]rom every standpoint except cost, the question and answer form [of an offer of proof] is the one best calculated to show the reviewing court the impact of the excluded evidence." 21 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure § 5040 at 214 (1977) As the Wright and Graham treatise goes on to explain:

> *12 Affidavits or avowals by counsel will usually be shaded to favor the party. Moreover, the question and answer method has the advantage of preserving the evidence for use should the witness be unavailable at any retrial. If the offer is taken in question and answer form, opposing counsel may be permitted to cross-examine the witness to develop any factors which would put the proffered testimony in its true light. *Id.*

This question and answer method was not used here, and I cannot say that it was the fault of petitioner's counsel. See 28 U.S.C. § 2254(e)(2). Under these circumstances, although I believe that the line of questioning precluded by the trial judge would have been a disaster for petitioner, I do not reach any final conclusion because a hearing may be required to at least determine what Denise Hill, if not Gladstone Smith, would have said if questioned. There is language in *Justice v. Hoke*, supra, that suggests that, if the testimony is helpful on its face, its exclusion cannot be justified because it does not appear to be credible. *Justice*, 90 F.3d at 49-50. While this standard seems to me to confuse the standard for the admission of evidence with the standard for determining whether its exclusion violates the Due Process Clause, it reflects the prevailing Second Circuit view. I decline to hold a hearing until the Court of Appeals determines whether I have correctly concluded that the issue was procedurally forfeited.[8]

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[8] Petitioner was also precluded from impeaching Hill's credibility with a letter in which she professed her love for him (notwithstanding the shooting). Any error caused by the exclusion of the letter was

CONCLUSION

The Petition for a writ of habeas corpus is denied. I grant a certificate of appealability with respect to the following issues: (1) whether petitioner was deprived of his right to confer with counsel; (2) whether the application for leave to appeal to the Court of Appeals properly preserved the issue raised in petitioner's supplemental brief regarding the cross-examination of Denise Hill and the admissibility of the impeachment testimony of Gladstone Smith. The District Attorney is free to argue, as an alternative ground for affirmance that the latter claim does not justify relief, and that the petition was not timely filed.

So Ordered.

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harmless, however, because defense counsel elicited Denise Hill's testimony that she still loved petitioner. (Tr. 411).

COURT OF APPEALS
STATE OF NEW YORK

January 23, 1992

APPELLATE DIVISION–SECOND DEPARTMENT
KINGS COUNTY

September 30, 1991

PEOPLE

– v.–

MORGAN (DARIUS)

Applications in criminal cases for leave to appeal denied January 23, 1992 (Hancock, Jr., J.)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION–SECOND DEPARTMENT

September 30, 1991

THE PEOPLE, ETC.,

Respondent,

– v.–

DARIUS MORGAN,

Appellant.

**593 Philip L. Weinstein, New York City (Rosali Vasquez, of counsel), for appellant.

Darius Morgan, *pro se*.

Charles J. Hynes, Dist. Atty., Brooklyn (Jay M. Cohen, Anthea H. Bruffee and Camille O'Hara Gillespie, of counsel), for respondent.

Before:

THOMPSON, J.P., and BRACKEN, ROSENBLATT and O'BRIEN, JJ.

MEMORANDUM BY THE COURT

*359 Appeal by the defendant from a judgment of the Supreme Court, Kings County (Heller, J.), rendered June 28, 1989, convicting him of murder in the second degree and attempted murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

During the trial of this case, the prosecutor indicated to the court that the People's main witness had indicated to her that she would not testify against the defendant because she feared for the safety of her family. After the prosecutor moved for a hearing to determine if the defendant was responsible for the witness being intimidated (*see, Matter of Holtzman v. Hellenbrand*, 92 A.D.2d 405, 460 N.Y.S.2d 591), the court adjourned the case to the following day. The next afternoon the prosecutor informed the court outside the defendant's presence that the reluctance of the witness to testify was waning. However, the court decided to proceed with a hearing and directed defense counsel not to discuss with the defendant the increased likelihood that the witness would testify in this case. This gag order was in effect during an overnight recess.

The defendant claims that the court's instruction violated his right to the effective assistance of counsel. We disagree. Not every restriction upon a defendant's access to his attorney constitutes reversible error *per se*. The ruling in issue here was of very limited scope. The court did not prohibit all *360 conversations between the defendant and his attorney, but only discussion relating to the likelihood that the witness in question would testify (*see, People v. Narayan*, 88 A.D.2d 622, 449 N.Y.S.2d 1008; *cf., Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592). Under the circumstances present here there was no error of law requiring reversal (*see, Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594,

102 L.Ed.2d 624; *cf.*, *People v. Blount*, 159 A.D.2d 579, 552 N.Y.S.2d 441, *affd.* 77 N.Y.2d 888, 568 N.Y.S.2d 908, 571 N.E.2d 78).

The defendant's assertion that the police officer's testimony regarding the statement made by the witness in question at the hospital following the incident which inculpated the defendant constituted impermissible bolstering by the People has not been preserved for appellate review as a matter of law (*see*, CPL 470.05[2], *People v. Love*, 57 N.Y.2d 1023, 457 N.Y.S.2d 474, 443 N.E.2d 948). In any event, in view of the strength of the People's case, the alleged error must be deemed harmless (*see*, *People v. Crimmins*, 36 N.Y.2d 230, 242, 367 N.Y.S.2d 213, 326 N.E.2d 787).

We have considered the defendant's remaining contentions, including those raised in his supplemental *pro se* brief, and find them to be without merit.